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SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-733

Harvey H. Allen and Simona A. Allen,

Petitioners

vs

State Board of Education of North Carolina et al.,

Respondents

**********

SUPPLEMENTAL BRIEF OF PETITIONERS

**********

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Petitioners, Harvey H. Allen and Simona A. Allen, file this supplemental brief pursuant to Rule 24(5) of the Rules of this Court, which reads:

> "Any party may file a supplemental brief at any time while a petition for a writ of certiorari is pending calling attention to new cases or legislation or other intervening matter not available at the time of his last filing."

Specifically, Petitioners seek permission to call to the Court's attention the case of Adickes v S. H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970), in which this Court granted certiorari to review and then reversed a decision of the Court of Appeals for the Second Circuit, which affirmed a summary judgment entered by the District Court for the Southern District of New York.

Adickes has a major heading (398 U. S. at 153) entitled "B. Summary Judgment," under which this Court seems to decide at least three things regarding summary judgments:

1. One who seeks a summary judgment has "the burden of showing the absence of a genuine issue as to any material fact, and for these purposes" the evidence offered "must be viewed in the

light most favorable to the opposing party." (398 U.S. at 157)

2. The evidence offered must be sworn, and unsworn evidence "does not meet the requirements of Fed. Rule Civ. Proc. 56(e)." (398 U.S. at 158, Note 17)

3. If the "initial burden" of proof is not sustained by one who seeks a summary judgment, then the opposing party is "not required to come forward" with any contrary evidence. (398 U.S. at 160)

In this case Respondents did not offer any evidence of any kind, either sworn or unsworn, and that is why Petitioners believe that their case is stronger than Adickes on the questions of summay judgment.

EVIDENCE IS INDISPENSABLE

In the opinion of Petitioners, the effect of Adickes is that sworn evidence which establishes "the absence of a genu-

ine issue as to any material fact" is an indispensable ingredient of a summary judgment under the Federal Rules of Civil Procedure, and that without such evidence it is not possible to secure a valid summary judgment under Federal law.

DISMISSAL ON MERITS WITHOUT EVIDENCE

Without hearing any evidence and entirely "based on facts not appearing of record" (Rule 43(e) of Federal Rules of Civil Procedure), and without finding "the facts specially" (Rule 52(a) of the Federal Rules of Civil Procedure), the District Court dismissed on the merits (as "merits" are defined by Rule 41(b) of the Federal Rules of Civil Procedure), "any claim raised by the pleadings in this cause that would affect the validity of the 24.8 million dollar bond issue voted by the people of Forsyth County on

March 16, 1968" ("Exhibit C" attached to the Petition for Certiorari).

The "facts not appearing of record" were delineated in the Brief of Respondent Winston-Salem/Forsyth County Board of Education before the Court of Appeals, in statements which include the following at the pages indicated:

> "Because of these allegations in the Complaint, bond counsel has refused to issue a 'no litigation' certificate, which the County must have in order to market the bonds." (Pages 3-4)

> "A final and irrevocable determination of the validity of the bonds must be made before bond counsel can be induced to issue their certification making the bonds marketable." (Page 5)

> "Should the court below be affirmed, bond counsel has indicated that they will issue their no litigation certificate and the Board of County Commissioners will be able to issue the bonds in its discretion." (Page 6)

> "The plaintiffs have never con-

> tended that the bond election was invalid or that the bonds when issued would not be valid obligations of the County of Forsyth." (Page 4)

Bond counsel did not take the stand and no evidence of any kind was offered at the hearing of the motion for summary judgment.

Petitioners respectfully suggest that, before any part of the substitute complaint of Petitioners could be lawfully dismissed under this Court's Adickes case, supra, sworn evidence would have to be put in the record establishing the absence of any issue as to any material fact encompassed within such pertinent questions as the following concerning the facts not appearing of record in this case:

1. Was the refusal of bond counsel to issue its certificate in writing, and if so what were the written provi-

sions of such refusal and their relation to the alleged necessity of dismissing parts of the substitute complaint?

2. What proof is there that the bonds could not in fact be sold without a no-litigation certificate from bond counsel employed by Respondents?

3. What proof is there that no other bond counsel would issue such a certificate without dismissal of parts of the substitute complaint?

4. What proof is there that the bonds would not in fact be valid obligations of Forsyth County without such a certificate from bond counsel employed by Respondents?

5. The final summary judgment having dismissed "any claim raised by the pleadings" to which in effect bond counsel objected, was there included in the dismissal the claim in the substitute com-

plaint that the Court of Equity should not allow the bond issue to be issued and sold under the circumstances of this case "except pursuant to a plan approved in advance by" the Court, and what proof is there that this claim is related in any way to the alleged need for a no-litigation certificate, or that this claim should be dismissed without hearing any evidence to support it?

WHEREFORE, Petitioners pray:

1. That the Court permit to be added to the Petition for Certiorari the case of Adickes v S. H. Kress & Co., supra, and particularly the section of Adickes which bears the heading "B. Summary Judgment," 398 U.S. at 153.

2. That the Court compare the factual situation in Petitioners' case, where no evidence of any kind, sworn or

unsworn, was heard upon the motion for summary judgment, with the factual situation in Adickes, where both sworn and unsworn evidence was submitted, but still this Court granted certiorari and reversed the summary judgment.

3. That the Court, on the strength of Adickes, as well as the record and the authorities in the Petition for Certiorari, grant certiorari in this case as adequately meeting the requirements of Rule 19(1)(b) of the Rules of this Court.

Respectfully submitted,

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